

OGC Has Reviewed

27 October 1970

MEMORANDUM FOR THE RECORD

SUBJECT: Function of Contracting Officer

1. There is an increasing tendency on the part of the Federal courts to take jurisdiction of protests by disappointed bidders on Government contracts. Scanwell Laboratories, Inc. v. Shaffer, 14 CCF para. 83, 394. In some cases, the remedy is restricted to damages such as costs of preparation of bids and related costs, not to any prospective profits. Heyer Prods. Co. v. United States, 135 Ct. Cl. 63, 68, 140 F. Supp. 409, 412 (1956); Keco Industries, Inc. v. The United States, U.S. Ct. Cl. No. 173-69 (decided July 15, 1970). In some cases, however, the courts have actually directed the contract award to the protesting contractor. Blount-Barfell-Dennehy, Inc. v. United States, D.C., Okla. (6 August 1970); A. G. Schoonmaker Co., Inc. v. Stanley Resor, et al, D.C., Civil Action 1760-70 (24 September 1970).

2. These developments in the law make the role of the contracting officer all the more important particularly where there are competitions involving advance technical procurement and complicated technical systems. When a contract award is disputed and reaches either the appellate system in the executive branch, the Comptroller General, or the courts, the first question that normally arises is whether the contracting officer made the final decision as required by law and regulation and, if so, on what his decision was based. Any showing of arbitrary or capricious action or of a prejudicial approach favoring one competitor may result in upsetting the award with possibly calamitous results.

3. It is clear, therefore, that when a competition is undertaken, it is essential for the contracting officer to make sure from the outset that the record demonstrates he has treated all competitors on exactly the same basis, furnishing the same information to all. If inquiries are received from any one competitor as to the Government's specifications or its interpretation thereof, the inquiry and the Government's response should be made available equally to all competitors. If the award is to be made essentially to the low bidder on a simple procurement, normally no great problem faces the contracting officer, but in the more difficult cases where competition involves design and development in complex technical systems possibly involving different approaches to the same technical problem, the problem of evaluating proposals arises.

4. In such cases it is unrealistic to expect a contracting officer to make an informed and complete evaluation of all the aspects. Here, his first duty lies in seeing that the proper expertise is brought to bear on the problem and in so doing he must again make sure that he in no way prejudges the source selection or shows bias for or against any competitor. The contracting officer may call on individual experts in the various pertinent fields or on appropriate panels of experts to study various aspects of the procurement. In so doing he must again make sure that all competitors' submissions reach the experts or panels in substantially similar form that each receive full attention in the expert review. He must, of course, prepare complete and clear records of all aspects of his handling of the evaluation process.

5. On completion of the evaluations of the various pertinent areas, the contracting officer must be sure that he is in receipt of the full evaluations and all the pertinent information that went into the conclusions and, based on this, make a record of the procurement source he then selects as being his own determination. At this point, and prior to notification to contractors of selection, he should also consult counsel as to whether there has been anything in his selection process which could give rise to a legal claim from a disappointed competitor.

LAWRENCE R. HOUSTON
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